Supreme Court, U.S.
FILED
OCT 3 1996
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No. 96-287

In The
Supreme Court of the United States
October Term, 1996

KLAYMAN & ASSOCIATES, P.C., and
LARRY KLAYMAN,
Petitioners,

v.

BALDWIN HARDWARE CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

REPLY TO BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner Larry Klayman is the proprietor of Petitioner Klayman & Associates, P.C., a small law firm that has generally included himself and two (2) other attorneys. In approximately 1990, Petitioners agreed to represent Franksu Enterprise Corp., ("Franksu"), a Taiwanese manufacturer of bathroom accessories, and Decorators Accessories, Ltd. ("Decorax"), Franksu's U.S. importer, after they were named as defendants in a patent and trademark suit brought by Respondent Baldwin Hardware Corporation in the U.S. District Court for the Central District of California ("the Central District"). Because Petitioners believed Franksu and Decorax had a meritorious defense, but had been singled out unfairly by Baldwin, they agreed to represent defendants on a reduced fee basis, charging only $75 per hour rather than Petitioners' customary fee.

It is widely known that the U.S. bathroom accessory industry is dominated by Jewish entrepreneurs, including Mr. Richard Carter of Decorax. Early into the trial, the trial judge made several comments that Petitioners perceived to demonstrate extra-judicial bias and prejudice. Specifically, the trial judge repeatedly made derogatory references to people of Taiwanese and Asian descent, such as Franksu's owner, Mr. Frank Su, mockingly mispronounced the last name of a Jewish witness, and referred to the Jewish owner of Decorax as "Mr. Carter and his ilk," among other serious indicia of extra-judicial bias and prejudice. It also became known that the trial judge had held stock in Respondent's parent company during early but significant parts of the case. Consequently, Petitioners were asked by their clients to move for the trial judge's recusal, not so much to force the trial judge to recuse himself (an unlikely result given his past history, *see Standing Committee on Discipline v. Yagman*, 55 F.3d 1430 (9th Cir. 1995); *U.S. v. Borrero-Isaza*, 887 F.2d 1349 (9th Cir. 1989); *see also U.S. v. Hobbs*, 991 F.2d 569 (9th Cir. 1993)), but to sensitize him, and hopefully insulate defendants from this apparent bias and prejudice.

Pursuant to their client's request, Petitioners orally moved the trial judge to recuse himself, setting forth their clients' concerns

diplomatically to avoid inciting him. *See* Appendix G. Not surprisingly, the trial judge denied the motion for recusal.

However, after denying the motion, the trial judge turned his wrath from Petitioners' clients to Petitioners themselves. The trial judge proceeded to brow beat counsel for the rest of the seven (7) week long trial. Specifically, he put a gag order on Petitioners's objections, threatened Petitioners with contempt, and even accused Petitioners of suborning perjury, among other unfounded accusations. Seizing on the trial judge's conduct, Respondent opportunistically advised the trial judge that it would file a motion for sanctions under 28 U.S.C. § 1927. The trial judge stated that he would address the issue of sanctions at the end of trial, but later said he was not inclined to sanction Petitioners under § 1927. *See* Appendix H at App. 11. As a result, Petitioners did not expect to be sanctioned at the close of the trial.

At the end of the trial, on July 24, 1992, the trial judge sprang upon Petitioners, *sua sponte*, an Order that even the trial judge admitted was intended to effectively prohibit Petitioner Klayman from ever appearing *pro hac vice* before the Central District of California again, save for one on-going case. *See* Respondent's Brief in Opposition ("Opp.") at A.19. After announcing his Order from the bench, the trial judge then gratuitously asked Petitioners if they wanted to respond. Petitioners did so. *See* Appendix H. On July 30, 1992, the trial judge predictably entered a written Order reflecting his previous, oral findings.

After Petitioners were sanctioned, they considered asking for a reconsideration of this Order, as well as of an award of attorneys fees entered against them on August 25, 1992 under 28 U.S.C. § 1927. Accordingly, Petitioners ordered a limited part of trial transcript -- that portion which concerned the *pro hac vice* Order and Petitioners' response. Ultimately however, Petitioners decided against filing a motion for reconsideration when their professional liability carrier and its counsel informed them that the sanctions orders were not covered by liability insurance and that, for strategic reasons, it would be better to simply file an appeal instead, especially as it was unlikely that the trial judge would reverse

himself. Petitioners thus took appeal from not only the *pro hac vice* Order, but from the § 1927 Order as well. Respondent cross-appealed, claiming that the trial judge should have awarded larger sanctions.

While Respondent received a daily transcript during the trial, it refused to make this transcript available to Petitioners. Respondents also represented that the transcript had cost in excess of $27,000. Due to the devastating impact that the seven (7) week trial had on Petitioners' financial situation, their professional liability carrier's decision not to reimburse them for the transcript and, ultimately to decline coverage and a defense, Petitioners could not afford to purchase the entire transcript themselves, nor could their clients. Consequently, Petitioners sought to obtain the transcript *in forma pauperis*. The same trial judge who had sanctioned Petitioners, denied their request for *in forma pauperis* treatment.

Petitioners then asked the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") to obtain the transcript. The Federal Circuit initially denied this request, but stated that it could ultimately be decided by the merits panel. After demonstrating that the self-serving, cropped portions of the transcript provided by Respondent for its cross-appeal were insufficient and grossly distortive of the trial record, Petitioners argued that the transcript should be obtained *in forma pauperis*, under the doctrine of completeness, or pursuant to the inherent authority of the Court. At oral argument, the Federal Circuit agreed. However, the Federal Circuit never obtained the transcript, which had mysteriously disappeared from the lower court's file. *See* Appendix I; Appendix J. Thus, not only were Petitioners denied access to the transcript in preparing their appeal, but the Federal Circuit affirmed the trial judge's sanctions without reviewing for itself the conduct at issue on appeal. Moreover, in rendering its decision, the Federal Circuit not only failed to obtain and review the complete transcript, but it also declined a belated offer by Respondent (made only at oral argument) to provide seventy-five percent (75%) of the transcript (*see* Appendix D at App. 47), and an offer by Petitioners to pay for the remainder.

ARGUMENT

A. The Issue of Extra-Judicial Bias and Prejudice is Properly on Appeal.

Importantly, the issue of extra-judicial bias and prejudice was presented to the trial judge -- albeit diplomatically to try to avoid inflaming him -- in Petitioners' motion for recusal.[1] *See* Appendix G. Among other evidence of extra-judicial bias and prejudice, in this oral motion Petitioners cited the trial judge's apparent "pre-judgment," repeated, negative comments about Mr. Frank Su's honesty, demeaning references to "Mr. Carter and his ilk," a *non-sequitur* about persons of all nationalities being treated equally after Petitioners questioned why Mr. Su was ordered back to the witness stand when Respondent's witnesses were never subject to such Orders, and general abusiveness towards Petitioners' clients and their witnesses, contrasted with comments about the extreme helpfulness of Respondent's witnesses. Moreover, the trial judge's ruling on this motion demonstrates that the issue of bias and prejudice was directly before him: "Now what counsel is really about here is alleging that over and above a [recusal] as indicated in section 455(a) or (b) as the case may be, that the court has engaged in misconduct. That is what your saying." *See* Opp. at A.7. The trial judge then cited a passage from *Pau v. Yosemite Park and Curry* Co., 928 F.2d 880 (9th Cir. 1991), in which the plaintiffs, who were from Hong Kong, made allegations of bias against a trial judge. Obviously, as the trial judge addressed these issues in his oral response to Petitioners' motion, they were clearly before him.[2]

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[1] Contrary to Respondent's representations, the failure to make a recusal motion in a district court "does not preclude raising on appeal the issue of recusal under § 455." *Pau v. Yosemite Park and Curry Co.*, 928 F.2d 880, 884-85 (9th Cir. 1991), *citing*, *Noli v. Commissioner*, 860 F.2d 1521, 1527 (9th Cir. 1988). Rather, it only increases the burden in demonstrating that the district judge erred in not recusing himself. *Id.*

[2] In its brief, Respondent tacitly admits that the trial judge referred to Petitioner Klayman as "Mr. Schmuckler." *See* Opp. at 11, n. 3; *see also* Appendix E at App. 55. Even if such a Mr. Schmuckler exists, it is improper for Petitioner Klayman to be berated in this fashion, as well as for another member of the bar, Mr.

Nonetheless, the issue on appeal was not only whether the trial judge should have recused himself, but whether there was, at a minimum, a showing of the appearance of extra-judicial bias and prejudice so as to call into question the propriety of the sanctions entered against Petitioners.

B. Petitioners Were Denied Due Process By the Trial Judge.

Due process requires that an attorney under threat of sanctions be provided particularized notice of the factual and legal bases for the sanctions to be imposed, and a meaningful opportunity to be heard. *Fellheimer, Eichen & Braverman, P.C. v. Charter Technologies, Inc.*, 57 F.3d 1215, 1225 (3d Cir. 1995) ("*FE & B*"). This requirement is especially important because an attorney's reputation is often at stake:

> Sanctions are not to be assessed without full and fair consideration by the court. They often entail a fine which may have more than a token effect upon an attorney's resources. More importantly, they act as a symbolic statement about the quality and integrity of an attorney's work -- a statement which may have tangible effect upon the attorney's career.

FE & B., 57 F.3d at 1227, *quoting*, *Simmerman v. Corino*, 27 F.3d 58, 64 (3d Cir. 1994). Indeed, due process safeguards were particularly important with regard to the trial judge's *pro hac vice* Order, which was admittedly intended to bar Petitioner Klayman from ever practicing before the Central District again:

> I want that judge who gets the next case coming here to know about you. That judge is going to know that I precluded you...to ever practice in front of this court again.

Schmuckler, to be so demeaned. Obviously, "Schmuckler" is a Jewish name of Yiddish origin, and its use out of context obviously has a pejorative, anti-Semitic connotation. Regrettably, this is but one example of the trial judge's general misconduct, which violated the Code of Judicial Conduct for United States Judges. *See Code of Conduct for United States Judges*, Canon 3(A) (1992).

Opp. at A.19.

If the record reflects that the judge imposing the sanction has been the target of the sanctioned attorney's vilification, or was otherwise personally embroiled with the attorney during the trial, a court must carefully assess whether additional due process safeguards are required. *In re Yagman*, 796 F.2d 1165, 1181 (9th Cir. 1986). Moreover, the presiding judge must be sensitive to possible conflicts of interest if events cast him into the roles of witness, prosecutor and judge. *In re Evans*, 524 F.2d 1004, 1008 (5th Cir. 1975).

In this case, it is readily apparent that the trial judge failed to provide notice of the factual and legal bases for the sanctions imposed on Petitioners. It is also clear that the trial judge never gave Petitioners any warning that he was even considering *pro hac vice* sanctions. Indeed, the trial judge even stated at one point that he was not inclined to award sanctions. *See* Appendix H at App. 11. Nonetheless, the trial judge "sprung" upon Petitioners the *pro hac vice* Order, effectively barring Petitioner Klayman from practicing before the Central District.

In addition, in issuing this *sua sponte*, *pro hac vice* Order on July 24, 1992, the trial judge made clear that he had already determined to sanction Petitioners: "I will issue an order which will set forth your transgressions if you do not convince me to the contrary..." *See* Opp. at A.19-21. The only hearing -- if it can be called that -- provided to Petitioners was the chance to deliver an "off the cuff" rebuttal, without any meaningful opportunity to reflect on the charges against them, much less retain counsel, gather evidence and present their defense to a neutral fact finder. Even then, Petitioners' abbreviated response made clear that they had a meritorious defense, and that, had they been given the opportunity to reflect upon the charges against them, retain counsel, gather evidence and present their defense to a neutral fact finder, the result may well have been different. This never occurred, however, and on July 30, 1992, only six (6) days later, the trial judge predictably issued his written Order.

Dropping this "bombshell" at the end of trial, without any advanced notice to Petitioners, or even any specificity as to the legal basis for the sanctions, hardly satisfies due process. Moreover, the ability to file a motion for reconsideration cannot, as Respondent contends, rectify this lack of due process -- especially where, as here, the trial judge had decided to sanction Petitioners even before he had heard their abbreviated response.

Even the limited portion of the trial transcript that is available demonstrates that the trial judge had become so personally embroiled with Petitioners during course of this heated, seven (7) week trial, that additional procedural safeguards were necessary to secure Petitioners' due process rights. Instead, the same trial judge who had mockingly referred to Petitioner Klayman as "Mr. Schmuckler" (and similarly mocked Mr. Goldstein by repeatedly emphasizing the last syllable of his name, *see* Appendix F at App. 59) and whose recusal Petitioners had sought on the basis of extra-judicial bias and prejudice, acted as witness, prosecutor and jury. In their defense, Petitioner Klayman stated:

> ...I ask you to step back, to think about this because what you have just ordered I do not feel is correct or just. I think we have been though a very heated proceeding, Your Honor. I think there is a lot of emotion here and I think this has to be brought out and I had hoped to be able to make this presentation before Your Honor made those finding[s] today.

Appendix H at App. 11 (Emphasis added).

Respondent's reliance on *FE & B* is misplaced. In that case, the sanctioned attorneys had more than eleven (11) weeks notice of the pendency of a motion for sanctions, as well as awareness that they had been accused of acting in bad faith. *FE & B*, 57 F.3d at 1225. In that case, the Third Circuit made clear that it was not disturbing authority requiring advanced notice of the specific charges and a meaningful opportunity to be heard:

> We do not intend to disturb the line of case law cited by [appellant] in its brief. Rather, our holding is a narrow one,

> compelled by our finding that FE & B was provided with sufficient, advanced notice of exactly which conduct was alleged to be sanctionable and, furthermore, that FE & B was aware that it stood accused of having acted in bad faith...We do not expect, however, that the result reached here will be often justified in future cases where the sanctioned party was not explicitly informed beforehand of the precise ground for the imposition of sanctions.

FE & B, 57 F.3d at 1225-27, *citing*, *Jones v. Pittsburgh Nat'l Corp.*, 899 F.2d 1350, 1357-58 (3d Cir. 1990).

C. Petitioners Were Denied Due Process on Appeal.

Likewise, Petitioners were denied due process on appeal. In *Griffin v. Illinois*, 351 U.S. 12 (1956), this Court recognized the important, due process right to have an appeal adjudicated on a full trial record. A review of the trial transcript was particularly important in this case where: (1) affidavits demonstrated multiple examples of extra-judicial bias and prejudice (*see* Affidavit of Richard Carter at Appendix E; Affidavit of Steven Goldstein at Appendix F); (2) Respondents' tacit acknowledgment of at least one such incident in which the trial judge likened Petitioner Klayman to a "Mr. Schmuckler" (*see* Opp. at 11, n. 3); and (3) the trial judge's history of making biased and/or otherwise improper remarks. *See Borrero-Isaza*, 887 F.2d at 1354; *see also Hobbs*, 991 F.2d at 571, 574.

At oral argument, the Federal Circuit acknowledged the importance of reviewing the complete trial transcript in adjudicating the parties' appeals. *See* Appendix D at App. 47-49. It not only failed to do so, but it also declined an offer by Respondent to provide seventy-five percent (75%) of the transcript (*see* Appendix D at App. 47), and an offer by Petitioners to pay for the remainder. Petitioners were not even able to review the trial transcript in the lower court's file, because it had mysteriously disappeared. *See* Appendix I. Surely, meaningful appellate review -- not only for purposes of Petitioners's appeal, but for Respondent's cross-appeal as well -- required that the Federal Circuit review the entire

transcript, or as much of it as possible, in order to rule on the important issues before it. *See* Appendix J. Because it failed to do so, Petitioners were denied due process in this regard as well. *Griffin, supra.*

D. This Court Must Resolve Conflicts Among the Circuits on Important Issues in the Law of Sanctions.

The U.S. Courts of Appeal for the Second and Third Circuits have held that a finding of bad faith is necessary before sanctions may be awarded pursuant to 28 U.S.C. § 1927. *See U.S. v. Int'l Bhd. of Teamsters*, 948 F.2d 1338, 1345-47 (2d Cir. 1991); *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 484 (3d Cir. 1987). However, the U.S. Court of Appeals for the Ninth Circuit, and now the Federal Circuit, have held that a finding of recklessness will suffice for such an award. *Optyl Eyewear Fashion Int'l Corp. v. Sytle Cos.*, 760 F.2d 1045, 1048 (9th Cir. 1985); Appendix A at App. 20 (Emphasis added). Thus, there is a readily apparent conflict among the Circuits as to the standard for imposing sanctions under 28 U.S.C. § 1927 that must, respectfully, be resolved.[3]

As a result of the Federal Circuit's decision, there is also a readily apparent conflict among the Circuits as to whether an express finding of bad faith is necessary for a court to enter sanctions pursuant to its inherent authority. In *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991), this Court held that, because of their "very potency," inherent powers should be exercised "with restraint and discretion." Thus, several of the Circuits require a highly particularized, express showing of bad faith before imposing sanctions pursuant to a court's inherent powers. *See Zambrano v.*

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[3] Respondent's represent that there is no such conflict based upon a Ninth Circuit case holding that, under 28 U.S.C. § 1927, a finding of bad faith or recklessness may be inferred from a review of the complete record. *MGIC Indemnity Corp. v. McKenna, Conner & Cuneo*, 952 F.2d 1120, 1122 (9th Cir. 1991). Obviously, whether a finding can be inferred from the complete record has no bearing on whether that finding must be "bad faith," or whether "recklessness" will suffice. In any event, the holding of *MGIC* is irrelevant to this case, because the Federal Circuit never had access to a complete record (*i.e.*, the trial transcript) from which it could make either finding.

City of Tustin, 885 F.2d 1473, 1478 (9th Cir. 1989); *Int'l Bhd of Teamsters*, 948 F.2d at 1345-47. Here, the Federal Circuit not only speculated that the trial judge had relied on the Court's inherent power in entering the *pro hac vice* Order, but it also affirmed the Order by inferring a finding of bad faith.[4] *See* Appendix A at App. 22. Thus, this case creates a precedent that directly conflicts with Circuits that require a highly particularized, express finding of bad faith, as well as this Court's holding in *Chambers*. Respondent's reliance on *FE & B* is again misplaced, because that decision was limited to its facts by the Third Circuit itself. *FE & B*, 57 F.3d 1225-27.

CONCLUSION

This case is of landmark importance not only because it raises important questions about judicial impartiality and the natural hesitancy of appellate courts to review judicial misconduct, but because of its serious implications for the bar, and for our legal system as a whole. While safeguarding due process is obviously important in all cases, it is especially important in the context of attorney conduct because of the effect that wrongfully imposed sanctions may have on counsel's zealous representation of clients. Imposing sanctions without adequate notice of their purported factual and legal basis, a meaningful opportunity to be heard, including, where appropriate, the right to counsel, and a neutral finder of fact, will undoubtably have a chilling effect on a lawyer's willingness to represent his or her clients to the fullest extent of the law. For this same reason, it is also of crucial importance that sanctions orders be carefully scrutinized on appeal. Because our legal system depends on a lawyer's willingness to represent his or her clients to the fullest extent, and because that willingness is threatened by wrongfully imposed and summarily affirmed sanctions such as these, the Court must, respectfully, grant *certiorari* to address the important issues raised by this unique case.

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[4] The holding of *MGIC* is irrelevant because that decision only involved sanctions awarded under 28 U.S.C. § 1927, not a court's inherent powers.

Respectfully submitted,

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APPENDIX G - EXCERPT FROM MAY, 1992 TRIAL TRANSCRIPT CONTAINING ORAL MOTION FOR RECUSAL

THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 90-4914 WDK (Bx)

BALDWIN HARDWARE CORP.,
Plaintiff,

v.

FRANKSU ENTERPRISE CORP, *et al.*,

Defendants.

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MR. KLAYMAN: Your Honor, I'd like to make a general motion.

THE COURT: What's that? What's a general motion?

MR. KLAYMAN: May I ask for a recess to make a general motion?

THE COURT: No. You want to make a motion, you can make -- I don't know what you mean by a general motion. I've never heard of a general motion.

MR. KLAYMAN: I have a motion that I wanted to make at the closing of the plaintiff's case, but I feel that it may be more appropriate at this time.

THE COURT: What's the general motion?

MR. KLAYMAN: Should I take the lectern?

THE COURT: You can stand there, sit there, or take the lectern, whatever you want to do.

MR. KLAYMAN: Your Honor, it's only after great consideration that I make this motion. I've given it great thought; I've thought about it and I have -- it's not the kind of thing that makes me happy, and I say it in a grave voice. I am convinced that I have to make the motion because I am counsel. I've taken an oath to protect my client zealously within the bounds of the law. And the motion is, your Honor, that I ask you to recuse yourself in this case. I know that we're all human. I'm human too. And I feel that sometimes you can prejudge an issue. And I have sat here throughout this case and have listened to certain things occur. And I would not be doing my job as counsel if I did not make the motion, and the motion is made under 28 U.S.C. 455(a).

THE COURT: I'm familiar with 28 U.S.C. 455(a).

MR. KLAYMAN: And allow me to enumerate some of the bases for that, your Honor, I believe, and I've made a record and I don't want to belabor the point here, because my intention is not to be abrasive; my intention is not to do anything other than my job. But I sat here and I've listened to comments that have reflected that my client is not telling the truth, that you referred to -- and when I questioned that, your Honor, that statement, your Honor disagreed with it and pointed out that this was not true. I got a very strong reaction.

You've referred to Richard Carter, one of my clients, as a Richard Carter and his ilk. In addition to questioning my client's honesty, you have ordered him back to the witness stand, and I felt it was ordered in a very strong and negative way, and I questioned that, and pointed out that you didn't do that with Mr. Sturrus. And you raised the issue that you treat everybody the same regardless of national origin. Your Honor, that was a non-sequitur in that context.

You've made comments that, Mr. Klayman, to the effect that you'd better watch yourself here, because I'm going to be trying the libel suit. The libel suit doesn't have anything to do with this case.

You've made comments about the plaintiff's witnesses before I had the opportunity to cross-examine those witnesses in terms of their extreme helpfulness towards the case; and it was at that point that, in my view, sitting here, made you explode. I'm not concerned with your approach towards me. I am concerned about it towards the client, however.

You early on during this proceeding questioned and suggested that Mr. Su is not telling the truth when he had a hernia operation and could not be here. We submitted medical evidence and letters from Mr. Su stating that, in fact, he did need that operation and, in fact, we also submitted letters and documentation showing that he wanted to go to trial. I released some attorney-client information that he'd sent to me saying he was anxious to go to trial, yet you questioned whether he wanted to be in trial and you made remarks in this case about him not showing up the first time, and that's why you ordered him back to the stand.

You have threatened me with contempt and sanctions. I think the record is clear that I am trying to do my job, your Honor. I have not been in any way negative towards either you or opposing counsel.

You have cut me off virtually at every opportunity to give an objection and to explain it and I've started to ask if I could have permission to explain, because I want to have an orderly proceeding, and you cut me off from that, too.

You made comments about a problem I had reading an exhibit, suggesting that the fact that I couldn't read exhibits on two pieces of door hardware suggested confusion in the case.

THE COURT: The confusion that was replicated with Mr. Su on the stand today when he said he identified the product -- I have a note on that. Yes, I did make that observation.

(Brief pause)

Exhibit 16. The witness stated that the product was his, unequivocally. Mr. Neuner, quite frankly, asked another question and

got an answer, "well, I don't know." When he had an answer: "it is my product." So then, to reinforce it, "That's your product?"

"Oh, well, I'm looking at it closely now; no, I don't think it's my product."

That's exactly what happened here. Okay?

MR. KLAYMAN: Your Honor --

THE COURT: And I want to say that you must, of course, make your record, Mr. Klayman. But I can't help but observe that the mistake that he made today was a mistake that you made earlier in this proceeding.

Please continue with your observations and/or objections.

MR. KLAYMAN: Your Honor, there is no record that anything other than the fact that this man has been under a lot of pressure -- he's been testifying for a long time. I did not take the advantage that you took of him. But this is another indication that you have prejudged the case.

And your Honor, I sat here for two days, and whatever the case may be in terms of how you perceive our client and myself, we took a tremendous amount of what I perceive to be abuse -- layered on top of the fact that admittedly at some point in this case you had a prospective interest, potential interest in Masco.

I have to say, your Honor, that the standard here is whether -- and there's a case, Fawn versus American Air Lines, 431 1334, Northern District of California, 1977.

THE COURT: What judge is it?

MR. KLAYMAN: I don't have the name of the judge, your Honor. It's one of a number of similar cases, wherein it states: The charge of lack of impartiality must be grounded on facts which would create a reasonable doubt concerning the judge's impartiality. Not in the mind

of the judge or even necessarily in the mind of the litigant, but rather in the mind of a reasonable person.

And sometimes, your Honor, when you yourself are involved -- I mean you plural, not you, your Honor -- it's hard to see what may be occurring. The standard here is the reasonable person, your Honor. And I submit, and submit strongly, and I'm not in any way happy about this. I think if anybody sees my demeanor here, I'm shaking a little bit because I've never done this before. But I firmly believe, and I'm sure that the record will reflect that this is that case where indeed prejudgment has occurred, and I ask you, your Honor, as a man of integrity, to recuse yourself of this case.

THE COURT: Your motion has been made, Mr. Klayman...

APPENDIX H - EXCERPT FROM JUNE 24, 1992 TRIAL TRANSCRIPT CONTAINING LARRY KLAYMAN'S ORAL RESPONSE TO JUDGE KELLER'S *SUA SPONTE*, *PRO HAC VICE* SANCTIONS

THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 90-4914 WDK (Bx)

BALDWIN HARDWARE CORP.,
Plaintiff,

v.

FRANKSU ENTERPRISE CORP, *et al.*,

Defendants.

pp. 116-129

THE COURT: ...Do you want to be heard?

MR. KLAYMAN: Yes, I do, Your Honor. Let me just say at the outset, I think that my demeanor in the record will show that I have always been respectful towards the court, towards you, towards Mr. Neuner and towards everybody on the other side. With regard to the other side, with regard to the plaintiff, Your Honor, I have gone through seven weeks of trial being accused of everything. It got to the point where I was even accused of suborning perjury. And at that point, Your Honor prevented me from consulting with my client. There was in effect a, quote, gag order, during a time when he was being accused of perjury. Plaintiff's counsel obviously was not only aggressive. Your Honor, this is not only offensive, but it severely jeopardized the rights of my clients and I came before this court to protect the rights of my clients. And I have always been the kind of a lawyer that has gone maximum for my clients within the bounds of the

law, and ethics. And for that reason, I don't regret my defending them the way I did in this case.

Your Honor, I believe that a lot of the vituperative and offensive accusations which were on a virtual continual basis were the result of wanting to retaliate for my having filed on behalf of my clients a liable (sic) action which this court sustained in a motion to dismiss. And it is a valid action, Your Honor. You are dealing here with a situation where you do have and forgive me for raising it again, a disparity between wealth, and we heard here today even plaintiff's counsel tried to raise the national issue, the fact that his client is American and mine is Taiwanese. Well, that doesn't make us any less virtuous.

THE COURT: I have made that very clear to you, Mr. Klayman, again and again, that everybody stands equal before this court. From time to time we have talked about forensics of presenting a case with these facts to a jury. That has no bearing on how you are addressed by the court nor by a jury because I have instructed them fairly well in this regard.

MR. KLAYMAN: Well, Your Honor I am an American and I am proud of it too. I am third generation American. My grandparents were Jewish from Russia and I knew them very well and I was very close to them and I felt close to people from overseas as well as I feel very proud of being an American and I do find that offensive. And I have always worked hard on all of my clients' behalf, whether they are rich or poor, and in this particular case, Your Honor, which is not the happiest moment of my life, today, and for the record, I defended my clients for 75 dollars an hour, two-thirds of the legal fees are outstanding. I doubt that I will be paid. I did it because I thought I was right in defending them. I have been here for seven weeks. My law firm is on the verge of financial ruin because to have two attorneys here that aren't getting paid out of three that currently exist, takes a big chunk out of legal fees, billings and cash flow and I am involved in other big cases. Your Honor, I am paying the price and I felt that I did what I thought was right.

And that also goes with regard to the motion I made for recusal. That was not meant personally towards you, or to the court. But

sometimes, Your Honor, we are all human, sometimes Your Honor, we do not always see things that other people can see from a distance. The older I get, and I am not that old, I am 41 next month, the more I realize little I know (sic). And in fact when you see the brief you will see I said just the same thing, Your Honor. I don't say that we didn't have some inadvertent errors here. They were inadvertent.

And I guess trying a lawsuit on less than full resources, less than a million to two million dollars which is what they spent, I think a million is conservative, I think they spent more, it is hard to do. But how do you deny people the right to counsel simply because they don't have the money like Baldwin, and maybe I am a soft touch, but it is hard with three lawyers.

THE COURT: Excuse me. You are not speaking to the issue that I raised namely --

MR. KLAYMAN: I am getting to the issue.

THE COURT: Namely my perception of various transgressions.

MR. KLAYMAN: I wanted to raise this because I do believe that when I did raise the recusal issue, Your Honor, I believe that subconsciously in your mind you transferred the wrath that I was perceiving on behalf of my client to me. And that that has affected the conduct of this trial and that is what I was saying about all of us being human. We are not all perfect. But I want to speak my mind and that is the way I am in other aspects of my life and that is the way I am here. It doesn't mean I don't respect this court. It means I am trying to do my job. And I will take the punishment that you have meted out and I will move on. And I will continue to do what I think is right.

Now, let me address your specific questions, specific issues. With regard to multiple objections without arguable basis, Your Honor, I do not believe sincerely that I made speaking objections and if there is one or two on the record it was inadvertent. I did not, I made a special point of not trying to interfere with testimony but I do have right to protect my client and he has a right too and I have to make objections where I think they are incorrect.

And we had a situation here where Mr. Neuner was very very aggressive towards our client, I am using that word very diplomatically, and I have to protect that client. That is what I am paid to do and that is what I feel morally I have to do.

Your Honor, in terms of your asking me to be quiet, it was never my intent to interrupt you or anyone else here. Since I do feel strongly about this case I guess a certain anxiousness in my perceiving certain things happening caused me to comment, but I think the record is clear and I think Your Honor knows that I never did it in a bellicose way and I never did it intentionally. And I never did it to disrupt. To the extent that I am human, I apologize for that. But to the extent that I am trying to be here as counsel to protect my client I cannot apologize.

With regard to the issue of 282, jury demands and requests for admissions, Your Honor, 282, that was an oversight by an attorney in our office and I accept responsibility. I am the head of that office. That is my office. It was inadvertent and there was no prejudice to the plaintiff.

And to the contrary, Your Honor, I think our legitimate concern about the failure to respond to request 57 and other requests is much much much more serious to this day. You have here a company that knows exactly what is out there. In fact patterned their products after what is out there. Admissions to that effect. It didn't produce one catalog, much less the products that they borrowed the designs from themselves.

I think equity is in order here, fairness, equality. And to the extent that I felt strongly about it, I didn't see that fairness come in.

With regard to request for admissions, I don't recollect that issue. I think there was a pleading that was filed late, a day late in this case and Your Honor sanctioned us over a thousand dollars for that. We had to pay sanctions in this case already.

Not obeying orders of the Court, Your Honor, we tried to obey all of your orders and I will continue to do so in the future.

With regard to the issue of Frank Su being here, Your Honor, we were coming from Washington and we got called after close of business on Monday, I did interpret the 36 hours to mean that we wouldn't start later than Thursday and told the clerk that. I did state that I needed time to meet with the client and get there myself. We were coming with a lot of exhibits and documents and other matters. I interpreted 36 to mean Thursday.

In terms of not bringing a client in to trial the first day, Your Honor, I think probably in your own practice you may have faced that issue or taken that approach. I didn't want Baldwin to grab him and put him on the stand before I had an opportunity to talk to him. I don't have the proximity that Mr. Neuner has to Redding to Taiwan. I talked with him very little before this case.

With regard to the Eurotech patent, Your Honor, I have seen a letter in the file from Ms. Karen Snow which mentioned that there was a Eurotech patent and I didn't see the subsequent letter which said that she looked for it and couldn't find it. I asked one question about the Eurotech patent believing that there was one, just, it was on cross-examination, just to see how the witness would react.

Mr. Neuner made a big issue of it and asked me to produce the Eurotech patent. I then went back to the office and found we didn't have a Eurotech patent and didn't realize, Your Honor, and perhaps it wasn't, I didn't take the note that Your Honor wanted a response on that particular day. I was going to ask for additional time to look for it more, but in fact it was an honest mistake and it was just a cross-examination question.

Suppose I asked about anything to see if I could refresh the witness' recollection. Maybe I would have jogged the recollection of another patent. But I didn't say anything that I didn't believe to be true at the time and in fact I just simply withdrew the question. It was an instant. There are many examples of that in the course of the trial. Nobody is perfect.

With regard to Sepco, late discovered art, Your Honor, again, I am sitting here as defense counsel. Mr. Neuner makes a very strong

accusation that my client is not telling the truth, he is perjuring himself. Your Honor, for whatever reason, decided he was going to question Mr. Carter himself, and asked a number of leading questions. And it is evident that you were a trial lawyer and you know how to ask questions and you do so in a very trial lawyer like way, and you built him up to that point. You started by asking well, isn't this case important to you? Well, since it is important to you, wouldn't you remember the prior art? Well, if you remember the prior art, wouldn't you tell that to your counsel? And isn't it a fact that you told him about it here?

You know, each question was building to get to the conclusion, Your Honor, and I don't think that Mr. Carter, knowing Mr. Carter, he is not someone who has a lot of strength, for lack of a better word. He is the kind of person who somebody who is much more dominant than he is will react to that and you do have a position of authority here, Your Honor, and everybody respects that and consequently his testimony that you elicited as you perceived it, came out differently than when I elicited it. But in fact when you go back on it neither Ms. Snow nor I were at that fair that he says perhaps Sepco was at and he recognized that. That fair was after us, after we had gone to an earlier fair in Philadelphia. Sepco wasn't even displaying there and therefore it was an impossibility. And then Mr. Neuner comes along and he asks some questions about Sepco and Mr. Carter gives him the same dates that I got.

Your Honor, I ask this lawyer to lawyer, lawyer to judge, one human being to another, I ask you to step back, to think about this, because what you have just ordered I do not feel is correct or just. I don't think on reflection that you will think that way either. I think we have been through a very heated proceeding, Your Honor. I think there is a lot of emotion here and I think this has to be thought out and I had hoped to be able to make this presentation before Your Honor made those findings today. I did understand Mr. Neuner's motion to have me sanctioned under 1927, I did understand you to say you were disinclined to grant it.

I thought I would have the opportunity to speak and say these things before. Because I believe that you will understand when you have a

chance to step back, just like I have tried to step back. It was not my desire to put myself into conflict with anyone here. But I had a client to represent.

So consequently, I ask for you to reconsider it, Your Honor, and I also ask for you to reconsider the nature of the relief that you are providing. Not only will it irreparably harm me to issue that order, not just on 1927, but with regard to *pro hac vice*, before there is any opportunity to ask for reconsideration or appeal, but it will also reparably (sic) harm my clients because I do have other clients pending before other judges and I think that you can understand that if another judge perceives that a lawyer is, as I have been accused, dishonest, disreputable, unprofessional, you name it, I have been accused of it, that when I walk into the court with that client, that not only am I at a severe disadvantage if not severely prejudiced, but the client is as well.

In fact I remember going to a seminar, I think given by a lawyer who was explaining the technique of F. D. Bailey (sic), I think maybe it was Professor Irving Younger. He said, Professor Irving Younger when he talks about his client always says "we" to the jury. He wants the jury to identify with him as well as his client.

Your Honor, the client and the lawyer is in many respects inseparable. The jury will perceive lawyer. The judge will perceive that lawyer sometimes through how he perceives the client. That may be what happened here or maybe even vice versa.

Consequently by issuing that order, Your Honor, and sending that to every judge, this will irreparably harm my reputation and irreparably harm my clients and could very well affect their interests.

Your Honor, if I have offended you in some way, that was not my intent. I have tried to be professional. I have tried to do my job. I have done it at great expense to myself, financially, emotionally and otherwise. I have worked 16, 18 hours a day for the last seven weeks. I have not been able to tend to other cases during that period.

Your Honor, we have paid the price, whatever that price may be and, Your Honor, I feel that I was trying to do my job as a lawyer. That is the effect of it.

THE COURT: All right. We have motions to get in, is that right?

APPENDIX I - JULY 6, 1995 LETTER FROM THE CLERK OF THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT TO THE CLERK OF THE U.S. DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

717 MADISON PLACE. N.W.
WASHINGTON, D.C. 20439

July 6, 1995

FRANCIS X. GINDHART
CLERK

TELEPHONE: 633-6550
AREA CODE: 202

VIA FAX AND FIRST CLASS MAIL

Mr. Frank E. Goodroe
Clerk
U.S. District Court
U.S. Courthouse
312 North Spring Street
Los Angeles, CA 90012

Re: DCt. #90-4919, J. Keller
CAFC #93-1185
Baldwin Hardware v Franksu Enterprise

Dear Mr. Goodroe:

This is a request for your assistance in obtaining the complete trial transcript in the above appeal.

On September 21, 1994, our request was faxed to Valerie Feleh in your office. However, the only parts of the record you forwarded were: (1) 2/25/91 Initial Conference; (2) 12/16/91 Pretrial Conference; (3) 1/3/92 Telephonic Conference concerning illness of Defendant

Frank Su; (4) Amended version of (3) above; and, (5) 3/1/93 Post-trial Hearing on Civil Contempt/Violation of Injunction.

The judges on the panel have been more than patient awaiting the complete transcript. Although recognizing that the transcript involves a 7-week trial beginning on or about 5/7/92, and is apparently several thousand pages in length, the delay of now over 8 months in providing the transcript is questioned by the court.

Mr. VanVeen of my office has been diligently pursuing the request and has spoken with Valerie Fejleh, Bonita, Dawn Bullock, Derrick Martin, the court reporter, and lastly, Tyrone Lawson.

I would appreciate your looking into this matter as the court needs the trial transcript immediately.

Very truly yours,

/s/
Francis X. Gindhart
Clerk

df
cc: Judge Keller

APPENDIX J - APRIL 14, 1994 LETTER FROM THE ANTI-DEFAMATION LEAGUE TO LARRY KLAYMAN*

ADL

Anti-Defamation League

April 14, 1994

Larry Klayman, Esq.
Klayman & Associates, P.C.
501 School Street, S.W.
Suite 700
Washington, DC 20024

re: Baldwin Hardware Corp. v. Frank Su et al.,
Appeals Nos. 93-1185, 93-1186

Dear Mr. Klayman:

This letter responds to your correspondence and to your allegation that Judge William D. Keller made anti-Semitic remarks from the bench during the trial of the above-referenced case.

We take your allegations seriously, but cannot evaluate it fully based on the material you have provided to date. Consequently, we believe it would be in the best interest of all concerned, including the Judge, if the transcript of this trial were made available so that this allegation can be either supported or refuted, both generally and in the context of your appeal.

* This letter was made part of the record before the Federal Circuit as an exhibit to Petitioners' August 15, 1994 Renewed Motion for Access to the Trial Transcript and to Supplement the Record to the Merit's Panel.

For this reason, we support your effort to obtain the trial transcript.

Sincerely,

/s/
Abraham H. Foxman
National Director